V. WAIVERS SHOULD BE PERMITTED FOR FAILED AND DISTRESSED STATIONS

The Commission has provided consistently for ownership rule waivers for failed stations and stations in financial distress.[55] It should do so as well in the case of newspaper-radio cross-ownership waivers. There is no sound reason to deny stations or newspapers that are in financial difficulty the opportunity to reestablish themselves as viable competitors through common ownership. Indeed, the public will benefit more from a newspaper or station that can continue to compete by virtue of common ownership than it will from loss of an independent voice.[56]

Additionally, the Commission should grant waivers to permit the transfer of grandfathered combinations or to permit the reacquisition of a previously-owned facility. Such a waiver policy would be consistent with prior waivers of the newspaper/broadcast cross-ownership prohibition, and would comport with the public interest. Further, such waivers would perpetuate existing or restore prior diversity and, as such, would not harm the prohibition's goals.

VI. ANY WAIVER POLICY SHOULD BE LIBERAL, REFLECTING THE RULE'S UNDERLYING CONSTITUTIONAL INFIRMITY

The need for a newspaper/radio cross-ownership waiver policy is emphasized by the rule's shaky constitutional basis. NCCB upheld the newspaper/radio cross-ownership rule based

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55/ See, e.g., One-to-a-Market Order, supra; Satellite Order, supra; Tulsa 23, 5 FCC Rcd 727 (1990); Telemundo Group, Inc., FCC 94-341 (Dec. 23, 1994); Dorothy J. Owens, FCC 90-298 (Nov. 8, 1990).

56/ The loss of a daily newspaper in Washington, D.C. occasioned by the Commission's lack of action on a newspaper/television cross-ownership waiver request stands as stark testimony to the truth of this assertion. Washington Star Communications, Inc., 54 FCC 2d 669 (1975).

in large part on the broadcast media's "unique and special problems" associated with limited spectrum availability,[57] as well as on the FCC's intention of promoting diversity and economic competition. In the eighteen years since NCCB, these justifications have either failed to materialize or no longer exist. Furthermore, contrary to the Court's expectations, waivers have not been available. When combined with the evolution of constitutional interpretation, the continuing constitutionality of the cross-ownership rule is at best questionable.

Scarcity. The Supreme Court has relied on the physical limitations of the broadcast spectrum as the basis for upholding regulations on broadcasters that would violate the First Amendment if imposed on other media entities.[58] "[B]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[59] However, this rationale is no longer applicable to the communications market which has matured in the twenty-seven years since the scarcity doctrine was introduced.

In 1969, there were 6175 radio stations and 672 television stations on the air.[60] As of January 31, 1997, these numbers had swelled to 12,151 radio stations and 1556 television stations.[61] This doubling in the number of speakers signals an ample supply of spectrum.

57/ Id. at 799.

58/ See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).

59/ Id. at 390.

60/ 1 BROADCASTING & CABLE YEARBOOK 1996 B-671, C-244 (1996).

61/ FCC Public Notice, "Broadcast Station Totals as of January 31, 1997" (Feb. 5, 1997).

Today, economic constraints are more significant limitations on new broadcast entry than technical limitations.

Moreover, the theory underlining spectrum scarcity is flawed. First, the purchase and sale of broadcast stations makes it obvious that anyone that wishes to broadcast may do so. The only real restraint on broadcast ownership is economic, the same restraint that affects entry into the newspaper, cable and other media businesses. Second, the spectrum scarcity theory is a creature of its time. When Red Lion was decided, video information and entertainment providers had no comparable alternative delivery mechanism. The growth of cable systems, and the availability of other multiple channel providers such as DBS, make the reliance on spectrum scarcity a particularly quaint argument in today's media environment.

Americans today can increasingly turn to cable television, DBS, MMDS, the Internet and soon digital television and DARS for information and entertainment. These technologies prove that the limits on the spectrum are not absolute and do not inhibit new speakers' ability to be heard in the marketplace of ideas. The Commission has recognized that continued advances in technology may make it possible to utilize the spectrum even more efficiently to permit an even greater number of broadcast licensees.[62] Moreover, the growth of nonbroadcast media, such as cable television and the Internet, provide additional outlets for speech. With these developments the public enjoys a substantial variety of sources of information, ensuring that the marketplace is fully responsive to the public's needs for diversity.

62/ Syracuse Peace Council, 2 FCC Rcd 5043, 5054-55 (1987).

The spectrum scarcity rationale cannot withstand scrutiny in the light of current market conditions. The 1969 scarcity of spectrum does not exist in 1997, and the outdated and increasingly rejected spectrum scarcity rationale therefore can no longer support the restrictions of the newspaper/radio cross-ownership rule. Indeed, the U.S. government is adding spectrum for content purposes at a substantial level as mandated by Congress.[63]

Disparate Treatment. Since the scarcity rationale is no longer applicable, the newspaper/radio cross-ownership restrictions that impact radio and newspaper owners differently from other media entities are also unconstitutional. "[G]overnment may not restrict the speech of some elements of our society in order to enhance the relative voice of others."[64] The newspaper/radio cross-ownership rule singles out newspaper owners for more restrictive treatment than other purchasers of broadcast properties and only local broadcasters are prohibited from publishing newspapers. Recent court decisions[65] indicate that a substantial justification would be required today for Section 73.3555(d)'s limitations on newspapers' right to participate in today's diverse media marketplace. And given the diversity in that marketplace, no such justification is available.

63/ See, e.g., Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), Notice of Proposed Rulemaking, FCC 96-441, GN Docket No. 96-228 (released November 12, 1996) at ¶ 9 ("[W]e propose to permit a WCS licensee to use this spectrum for . . . broadcasting-satellite services . . . ."); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, 11 FCC Rcd 1 (1995) at ¶ 2 ("Satellite DARS will both compete with and complement traditional terrestrial AM and FM radio service.").

64/ Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

65/ See, e.g., 44 Liquormart, 116 S. Ct. 1495 (1995); C&P Telephone Company v. U.S., 42 F.3d 181 (4th Cir. 1994).

The Commission's arbitrary restriction is an anachronism in an era of increasingly liberalized ownership regulation of other media. As described supra, the Commission has substantially eased ownership restrictions on other media and is contemplating even further relaxation. Telephone companies, in particular, have won first amendment arguments and are now permitted to enter video content businesses.[66] Why should newspapers -- that as an industry are dwarfed by companies such as the RBOCs and GTE -- be singled out for excessive restrictions? This Commission has not been even-handed in dealing with newspapers: its unbending application of onerous newspaper ownership restrictions has been unique in its history and, it is submitted, is unconstitutional and ultimately detrimental to the public interest.

Lack of a Waiver Policy. The absence of a rational waiver policy for the newspaper/radio cross-ownership rule clearly makes the rule constitutionally suspect. The Court in NCCB noted that the reasonableness of the regulation is "underscored by the fact that waivers are *potentially available*."[67] However, in the twenty-one years since the cross-ownership rule was adopted, the Commission has granted only two permanent waivers. The absence of more waivers in over two decades fails to satisfy the Court's expectations and therefore exceeds the Commission's general rulemaking authority.[68] As a practical matter, waivers have not been available. In these circumstances, the newspaper/radio cross-ownership rule is unconstitutional.

66/ 1996 Act, §§ 651, 653; see Bell Atlantic-New Jersey, Inc. Certification to Operate as an Open Video System, DA, 96-1723 (October 17, 1996).

67/ NCCB, supra, 436 U.S. at 802 n.20 (emphasis added).

68/ "[S]o long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases." NCCB, supra, 436 U.S. at 795.

CONCLUSION

The time has come for the Commission to give tangible form to its oft-repeated recognition that today's media marketplace is highly competitive and diverse and that extraordinary ownership restrictions like the newspaper/broadcast cross-ownership rule are no longer necessary to ensure diversity or competition. Establishing a waiver policy to permit local newspaper ownership of radio stations is a small first step. That step should be taken promptly to permit the public to enjoy the public service benefits that the broadcast pioneers of the newspaper industry brought to their listeners and viewers for so many years. That step should be followed by institution of proceedings looking toward deletion of the newspaper-broadcast prohibition. The Joint Parties urge the Commission to act expeditiously to adopt a waiver policy as described herein.

Respectfully submitted,

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